



Use of Alternative Dispute Resolution in Enforcement Actions

Introduction

Alternative Dispute Resolution (ADR) is a tool which enhances the negotiating process. ADR is a standard component of EPA's enforcement program. It should be considered at any point when negotiations are possible. This fact sheet answers common questions about the use of ADR in enforcement actions and describes how to use ADR in your case. This is the first in a series of Fact Sheets on ADR use.

What is ADR?

ADR is a short-hand term for a set of processes which assist parties in resolving their disputes quickly and efficiently. Central to each method of ADR is the use of an objective third party or neutral. In this fact sheet the use of the term "ADR" refers to all methods of ADR. The methods used by the Agency include the following:

- **Mediation** is the primary ADR tool used by EPA. It is a process in which a third party, with no decision-making authority, assists disputants to reach a voluntary negotiated settlement. In mediation, EPA retains its control of the case as well as its settlement authority.
- **Convening** involves the use of a third party to organize disputants for negotiations and assist them in deciding whether to use ADR and in the selection of an appropriate ADR professional.
- **Allocation** is the use of third party neutrals to assist the parties in determining their relative responsibilities for Superfund site costs.
- **Fact-finding**, often used in technical disputes, involves the use of a third party with subject-matter expertise to investigate and determine findings of fact.
- **Arbitration** is a decision-making process which can be binding or non-binding. A third party hears the dispute and renders a decision. EPA may enter into binding arbitration for cost

recovery claims below \$500,000 under CERCLA 122(h)(2), 42 U.S.C. 9622(h)(2).

What is EPA's Policy On Use of ADR?

Use of ADR in appropriate cases has been EPA policy since 1987 (Guidance on the Use of ADR in Enforcement Actions, August 1987). The Administrative Dispute Resolution Act of 1990, (P.L. 101-552), 5 U.S.C. 581, strengthened EPA policy by encouraging the use of ADR in all federal disputes. Also, in 1990 the Civil Justice Reform Act was passed, authorizing that district court judges require parties to attempt mediation prior to litigation. A companion to these Acts, the Executive Order on Civil Justice Reform (No. 12778, October 23, 1991), requires all federal enforcement staff to attempt settlement, and offer use of ADR as appropriate, prior to initiating any litigation.

What is EPA's experience with ADR?

The Agency has used ADR to assist in the resolution of over 50 enforcement-related disputes to date. ADR has been used in negotiations arising under Superfund and the principal environmental statutes that EPA administers. Mediated negotiations have ranged from two-party Clean Water Act cases to Superfund disputes involving upwards of 1200 parties.

Participants in the 1990 ADR pilot for Superfund cases reported the following benefits: constructive working relationships were developed; obstacles to agreement and the reasons therefore were quickly identified; costs of preparing a case for DOJ referral were eliminated; and ongoing relationships were preserved.

What are the benefits of using ADR?

- It lowers the transaction costs for resolving the dispute.
- Mediated negotiations tend to focus more on resolving real issues, rather than posturing, and are less likely to get derailed by personality conflicts.

- In mediation, the parties are more likely to identify settlement options that are tailored to their particular needs.
- It alleviates the time-consuming burdens on EPA of organizing negotiations because a third party neutral is available to handle these tasks. This is particularly valuable in multi-party cases.

How do I know that ADR is appropriate for my case?

If you can answer the following questions affirmatively, then ADR may be appropriate for your case:

- Are there present or foreseeable difficulties in the negotiation which will require time or resources to overcome in order to reach settlement?
- Is your case negotiable, i.e. no precedent-setting issues are involved?
- Is there enough case information to substantiate the violation(s)?
- Is there sufficient time to negotiate in light of court or statutory deadlines, or are the parties willing to sign a tolling agreement (an understanding that a statutory deadline for starting a lawsuit will be extended)?

What ADR is NOT!

- A sign of weakness in the government's case
- A sign of weakness in the government attorneys' negotiation skills
- A depreciation of the government's potential recovery
- A last resort

What ADR services are available?

Assistance regarding the use of ADR is available at any time by phone from the HQ ADR Team and the regional ADR Specialists, who are identified at the end of this fact sheet. EPA has an indefinite services contract for dispute resolution services with RESOLVE, a nationally recognized ADR firm, to provide a wide range of ADR services to case team members. Services available include confidential consultation regarding use of ADR in specific cases, assistance in the location, selection and contracting of ADR professionals, and provision of neutral

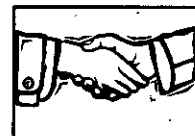
party services on behalf of the U.S. Trips to regional offices to assist in reviewing cases appropriate for ADR use can be arranged upon request.

How do I find out if anyone in my Region has used ADR?

Speak with your regional ADR Specialist and get a copy of recent ADR status reports.

How do I nominate a Superfund, RCRA corrective action, or Oil Pollution Act case for ADR?

It is a very simple process. For these disputes the ORC staff attorney should prepare a 1-2 page ADR nomination memorandum briefly outlining the substance of the case, the nature of the dispute, and the reasons that ADR would be of benefit to regional settlement efforts. This memorandum will be used as the basis for establishing a contract with the selected ADR professional. The ORC staff attorney should forward the nomination memo to the Regional Counsel, or designee, who has authority to approve the nomination. Then the appropriate regional official needs to commit funding for ADR services.



Consultation with one of the ADR Specialists on the use of ADR in a case should be obtained before the case is nominated. A copy of the nomination memo should be sent to the HQ ADR Liaison and your regional ADR Specialist. A model nomination memorandum is available on disk from your regional ADR Specialist.

What funding is available to pay for EPA's share of ADR expenses in these cases?

Beginning in FY '96 funding for ADR services will shift from HQ to the Regions and will be included as part of each Region's annual extramural Superfund budget based on regional need. If any Region is short of funds, please contact David Chamberlain, at 202-260-4118, and David Batson, HQ ADR Liaison, at 703-603-9004. Additional funding will be provided from the Office of Site Remediation Enforcement (OSRE) based on justified need.

to 50% of the ADR costs, where the Agency is a party to the selected ADR process. The estimated average historic mediation cost to EPA in Superfund cases is approximately \$20,000. Given the smaller number of parties generally involved, it is anticipated that the cost of mediating a RCRA case will be less expensive than for Superfund actions.

The Agency may, in appropriate circumstances, help to defray private parties' costs of obtaining ADR services in allocation deliberations. The Agency may pay up to 20% of the costs of ADR services in these situations.

Why must the costs associated with using ADR in an enforcement actions be shared equitably by the parties?

Two reasons. First, to enhance the neutrality of the ADR professional involved, it is important that the costs be shared by all parties to the extent possible. Second, several federal statutes, including the Miscellaneous Receipts Act, prohibit an agency from augmenting its congressionally-approved budget with services paid for by outside parties. Therefore, EPA must share the costs of a neutral's services with the other parties to an enforcement dispute.

Are government payments made to an ADR professional in a Superfund action tracked and recoverable as site costs for cost recovery purposes?

Expenditures by the Agency in support of the use of ADR in a Superfund action are cost recoverable expenses, reimbursement of which may be obtained through regional settlements or legal action. Regions may exercise their enforcement discretion regarding recovery of ADR expenditures. Each ADR case is assigned a separate delivery order or contract to allow for site tracking of ADR expenses.

Is ADR training available?

Yes. A one day overview training on the use of ADR in enforcement negotiations is offered in all of the regions each year. Furthermore, there are ADR components in several other popular EPA training courses. If you are interested in the training schedule for the current year call Rhonda Pierce at 202-260-8174.

How do I get copies of ADR guidances, reports and other related information?

The materials listed below are available at no charge to EPA employees from the National Technical Information Service (NTIS) (phone: 703-487-4650). You will need to provide NTIS with the number in brackets.

"Guidance on Use of ADR in Enforcement Cases" (1990), [PB94-963669], OSWER No. 9208.0-10.

"Guidance on Use of ADR for Litigation in Federal Courts" (DOJ, 1992), [PB94963-668], OSWER No. 9208.0-09.

"Enforcement Mediation-Status on Use of ADR in Enforcement Actions", [PB94963670], OSWER No. 9208.0-11.

"Superfund Enforcement Mediation Region V Pilot Results", [PB94-963671], OSWER No. 9208.0-12.

"Superfund Enforcement Mediation Case Studies", [PB94-963672], OSWER No. 9208.0-13.

ADR Specialists

Office	Name	Phone #	Fax #
Region 1	Ellie Tonkin	617/565-1154	565-1141
	Marcia Lamel	565-3435	
	Bruce Marshall*	573-9686	573-9662
Region 2	Tom Lieber	212/637-3158	637-3115
	Elena Kissel	637-3182	
	Janet Feldstein*	637-4417	637-4429
Region 3	Pat Hilsinger	215/597-2618	597-3235
	Laura Janson*	597-2393	597-9890
Region 4	Simon Miller	404/347-2641	347-5246
		x 2282	
	Charles Swan*	347-5059 x6194	347-7817
Region 5	John Tielsch	312/353-7447	886-7160
	Tinka Hyde*	886-9296	886-4071
Region 6	Miles Schulze	214/665-8049	665-2182
	Jim Dahl	665-2151	
	Carl Bolden*	665-6713	665-6460
Region 7	Bob Richards	913/551-7502	551-7925
	Linda Garwood*	551-7268	551-7063
Region 8	Suzanne Bohan	303/294-7591	294-7653
	Barry Levene*	293-1843	293-1238
Region 9	Shauna Woods	415/744-1360	744-1041
	Kim Muratore*	744-2373	744-1917
Region 10	Ted Yackulic	206/553-1218	553-0163
	Steve Mullen*	553-6520	553-0124
*Waste Management or Hazardous Waste division contact. Other names are in ORC.			
HQ ADR Team	Name	Phone #	Fax #
ADR Liaison	David Batson	703/603-9004	603-9117 603-9119
OSRE/RSD	Rhonda Pierce	202-260-8174	260-3069
OSRE/PPED	Ellen Kandell	703/603-8996	603-9117

What do I do for cases that arise under other statutes?

For other enforcement cases, the ADR nomination memorandum should be sent to the Division Director within the Office of Regulatory Enforcement who has responsibility for the statute under which the civil action is brought, with a copy to the HQ ADR Liaison and your regional ADR Specialist. The appropriate media program office is consulted upon receipt of the nomination. Funding for non-Superfund cases is approved on a case-by-case basis.

What contract mechanisms are available to obtain ADR services?

The following options are available: (1) the indefinite services contract with RESOLVE, which is managed by the Office of Policy, Planning and Evaluation (OPPE) (Debbie Dalton, Project Officer, 202-260-5495) and (2) expedited sole source contracting authorized by recent changes to federal acquisition regulations. The Regional Enforcement Support Services (ESS) contract may be used to obtain services to support the ADR neutral's efforts. To date, the RESOLVE contract has been the primary vehicle used by the ADR program.

A procurement request and other contracting documents must be submitted for each case to the appropriate contract official, following regional approval of the ADR nomination memorandum. It takes approximately 30 days to process the contracting documents through the contracts office. Models of an ADR procurement request and other contracting documents are available on disk from the HQ ADR Team or your regional ADR Specialist. Each Region should designate a lead staff contact for contract coordination.

Who manages the contract with the selected ADR neutral?

Each site-specific use of ADR requires either a separate contract or delivery order which is managed by the nominating region. To establish a contract or delivery order, the contracts office requires the designation of a Contracting Officer's Representative (COR).¹ The Remedial Project Manager (RPM), On Scene Coordinator (OSC), or other person familiar with the case may serve as a COR.

¹ Under the new contracting regulations, all Delivery Order Project Officers (DOPOs) and Work Assignment Managers (WAMs) are referred to as CORs.

How does a case team select and contract with an ADR neutral for his/her services? How long does this take?

The selection of an appropriate ADR neutral for a case is by agreement of all parties to the dispute. The regional/DOJ case team represents the U.S. in this decision. Assistance in identifying and considering appropriate neutrals is available from the HQ ADR Team or through EPA's contractor.

The services of the selected ADR neutral are obtained by all the parties to a dispute by entering a contract with the neutral. The contract, generally called a "mediation agreement", covers arrangements for sharing and paying the mediator's fees, the role of the mediator, confidentiality, and the right of any party to withdraw from the mediation. An EPA approved model mediation agreement is available on disk from your regional ADR Specialist or from the HQ ADR Team. You should use this as the basis for your negotiations.

The agreement is negotiated by the case team and the private parties, with assistance, if needed, from the HQ ADR Team or an ADR expert from RESOLVE. Experience has shown that the model agreement is generally acceptable to private parties and it should take no longer than two weeks to obtain a signed agreement.

Does a Region have the authority to sign the agreement with the ADR professional?

Yes. Once the funding has been committed by the Agency, the Region, generally the staff attorney, signs the agreement for EPA.

How much does it usually cost to use ADR in a case?

The cost of ADR services is determined by several factors, including the ADR professional's fees and travel, costs of meeting space, and the length of settlement discussions. All costs associated with the selected ADR process are shared equitably among the parties. EPA staff should keep the Agency's share payment commensurate with EPA's interest in the ADR process. At present, the Agency may pay 100% of the convening process and up